	1910–11	1911–12	1912–13	1913–14	1914–15	1915–16
Res. Grad. . . .	2	3	6	4	5	8
Third year . . .	178	219	176	169	167	177
Second year . .	238	217	186	197	197	226
First year . . .	296	289	287	260	288	308
Unclassified . .	82	76	84	64	68	66
Specials	3	4	5	1	5	1
	799	808	744	695	730	786

	1916–17	1917–18	1918–19	*1919–19	1919–20	1920–21
Res. Grad. . . .	10	5	3	—	8	11
Third year . . .	213	73	37	67	156	196
Second year . .	234	87	24	66	221	285
First year . . .	335	96	36	153	438	363
Unclassified . .	64	31	13	21	59	90
Specials	2	0	1	—	1	—
	858	292	114	307	883	945

* These figures are for the special session which began on February 3, 1919, and ended on August 30, 1919.

In the present first-year class one hundred and seventeen colleges and universities are represented, as follows:

Harvard, 74; Princeton, 22; Brown, Yale, 15; Williams, 11; Dartmouth, 9; Univ. of Illinois, Johns Hopkins, 7; Univ. of California, Cornell Univ., Univ. of Michigan, Univ. of Pennsylvania, Univ. of Rochester, 6; Univ. of Chicago, 5; Amherst, Bowdoin Coll., Univ. of Georgia, Univ. of Minnesota, Mt. Union Coll., Washington and Lee Univ., Wittenberg Coll, 4; City Coll. (N. Y.), Clark Coll., Univ. of Missouri, Univ. of Nebraska, Univ. of North Carolina, Univ. of Notre Dame, Oberlin Coll., Trinity Coll. (N. C.), Univ. of Utah, Univ. of Virginia, Wesleyan Univ. (Conn.), 3; Boston Coll., Catholic Univ. of America, Univ. of Cincinnati, Colgate Univ., Univ. of Colorado, DePauw Univ., Fisk Univ., Grinnell Coll., Haverford Coll., Howard Univ., Indiana Univ., Lehigh Univ., Leland Stanford Jr. Univ., Middlebury Coll., Univ. of Mississippi, Ohio Wesleyan Univ., Univ. of South Carolina, Univ. of the South, Syracuse Univ., Trinity Coll. (Conn.), 2; Alabama Polytechnic Institute, Univ. of Akron, Alberta Univ., Assumption Coll., Boston Univ., Biddle Univ., Butler Coll., Case School of Applied Science, Center Coll. (Ky.), Coll. of Charleston, Columbia Univ., Delaware Coll., Earlham Coll., Eastern Coll., Univ. of Florida, Franklin Coll., Georgetown Coll. (Ky.), Georgetown Univ., Hamilton Coll., Hamline Univ., Havana Univ., Heidelberg Univ., Hiram Coll., Indiana State Normal School, Iowa State Coll., Kalamazoo Coll., Knox Coll., Univ. of Lausanne, Lawrence Coll., Lincoln Univ. (Pa.), Loyola Univ., Univ. of Maine, Mississippi Coll., Mount Allison Univ., Nebraska Wesleyan Univ., Univ. of Nevada, New Hampshire State Coll., New York Univ., Univ. of North Dakota, Northwestern Coll., Oglethorpe Univ., Ohio State Univ., Pennsylvania State Coll., Univ. of Pittsburgh, Reed Coll., Rice Institute, Richmond Coll., Rutgers Coll., St. Josephs Coll. (N. B.), St. Lawrence Univ., St. Marys Coll. (Kans.), Univ. of Santa Clara, Tarkio Coll., Univ. of Tennessee, Univ. of Texas, Tulane Univ., Union Coll., United States Naval Academy, Valparaiso Univ., Virginia Military Institute, Wabash Coll., West Virginia, Wesleyan Coll., Whitman Coll., Wofford Coll., Univ. of Wyoming, 1.

CONSIDERATION AND THE NEW YORK TRANSFER TAX. — The scope of inheritance taxation, though it has been the subject of much legislation

and litigation, is not yet accurately limited. A tax on succession to property at the death of the owner naturally includes succession by will or intestate laws; but it cannot be confined to such succession without inviting evasion by means of agreements *inter vivos* and gifts.

It is a common provision of inheritance tax statutes that transfers by deed, grant, bargain, sale, or gift, intended to take effect in possession or enjoyment at or after the death of the grantor, vendor, or donor, shall be subject to taxation. The New York statute so provides.[1] Such legislation is an effective bar to this method of evasion; but the courts, in construing the statutes, have felt that the words, taken literally, tend too strongly to restrict legitimate transfers *inter vivos*, and are unfair to those who have already paid full value.[2] Accordingly, it has been held that the words "deed, grant, bargain, sale, or gift" mean simply "gift";[3] and that such transfers, when made for consideration, are not taxable.[4]

Having swung to its limit in this direction, the pendulum has recently started to swing back. In 1918 the Court of Appeals had before it a case, *Matter of Orvis*,[5] in which two partners had agreed to set aside a fund, to be owned by them in common during their joint lives, the survivor to take the whole. The court held that there was a valid contract, supported by consideration, but that nevertheless the transfer of the decedent's interest was taxable as being in its nature donative. The test laid down is whether "in the light of reason or of ordinary intelligence and judgment" the transfer is "beneficent and donative" or is "for money's worth." If the former, it is taxable.

In view of this decision, the Appellate Division seems to have reached the wrong conclusion in *Matter of Schmoll*,[6] recently decided. It was there held that the children of the decedent, who took one third of the community estate of the decedent and his wife under an antenuptial agreement, took free from the tax. The basis of the decision was that there was consideration for the father's agreement. That is true; and it is true also, as the court said, that such an agreement is enforceable in equity by the children.[7] But it is submitted that neither fact is conclusive. On the authority of *Matter of Orvis* the decisive question is whether the transfer was donative.

The contract in *Matter of Schmoll* was a contract for the benefit of a

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[1] See 1909 NEW YORK LAWS, c. 62, § 220 (4); CONSOL. LAWS, c. 60, art. 10.

[2] "The legislature did not intend that a purchaser who had paid full value for the property transferred should directly or indirectly pay the tax besides. . . . The statute was not intended to restrict or burden the right of persons to transfer property in all legitimate ways, and for all the usual and manifold purposes and objects of trade, commerce, and purchase. . . ." Matter of Orvis, 223 N. Y. 1, 7, 119 N. E. 88, 89 (1918).

[3] Blair *v.* Herold, 150 Fed. 199 (1907); Hagerty *v.* State, 55 Oh. St. 613, 45 N. E. 1046 (1897).

[4] Matter of Baker, 83 App. Div. 530, 82 N. Y. Supp. 390 (1903). Some statutes specifically except transfers for adequate consideration, *e.g.*, ". . . except in cases of a *bona fide* purchase for full consideration in money or money's worth." 1909 MASSACHUSETTS ACTS, c. 490, Pt. IV, § 1.

[5] See note 2, *supra*.

[6] 191 App. Div. 435, 181 N. Y. Supp. 542 (1920). See RECENT CASES, p. 221, *infra*.

[7] White *v.* White, 20 App. Div. 560, 47 N. Y. Supp. 273 (1897). See BANNING, MARRIAGE SETTLEMENTS, 1 ed., 1, 2.

third person, of the "sole beneficiary" type.[8] Such an agreement is in reality a contract to make a gift. Since someone else has furnished the consideration, the transfer is "beneficent and donative," even though the beneficiary can enforce it; and there is no reason why a gift of this kind should not be as clearly subject to the tax as any other.

This result, moreover, seems correct on principle. The New York transfer tax is a tax on the right to receive the property of the decedent.[9] It is levied on the amounts received by individual beneficiaries, not on the estate of the decedent as a whole.[10] It is reasonable, therefore, to require that if a transfer is to be free from taxation because consideration has been given for it, the consideration must move from the beneficiary. If he has given nothing, it is not unfair that his succession should be taxed.

It must be admitted that there is some authority against the view advanced here. There is one case directly in point [11] which supports the decision of the Appellate Division; but it was decided in the Surrogate's Court, and its authority is not binding. The cases which hold that a party to an antenuptial agreement may take under it tax free [12] are not in point, since the consideration moves from the one who receives the benefit.[13] The strongest support for the principal case is to be found in the life insurance cases. A contract of insurance, where the policy is payable to a beneficiary, is a contract for the benefit of a third person, of the same type as the agreement in *Matter of Schmoll.* The receipt by the beneficiary of the proceeds of such a policy is not taxable.[14]

The argument by analogy from these cases is strong. But the law of inheritance taxation is still somewhat confused, and reliance on analogies is dangerous. It is submitted that a development of the law along the lines laid down in *Matter of Orvis* will most nearly achieve the legitimate purpose of the statute.

FORFEITURE OF AUTOMOBILE SEIZED WHILE CARRYING INTOXICATING LIQUOR. — Effective enforcement of the law sometimes requires legislative enactments making property, itself illegal or used for illegal purposes, subject to forfeiture. This power has been freely exercised by

[8] See 1 WILLISTON, CONTRACTS, § 357.

[9] See Matter of Penfold, 216 N. Y. 163, 167, 110 N. E. 497, 498 (1915). See GLEASON AND OTIS, INHERITANCE TAXATION, 2 ed., 694.

[10] See 1909 NEW YORK LAWS, c. 62, § 243, as amended by 1910 LAWS, c. 706; CONSOL. LAWS, c. 60, art. 10. There is an exemption of $5,000 on the succession of certain individuals, and the rate of taxation varies according to the relationship of the beneficiary to the decedent. See 1909 NEW YORK LAWS, c. 62, §§ 221, 221 a, as amended by 1916 LAWS, c. 548; CONSOL. LAWS, c. 60, art. 10.

[11] Matter of Demers, 41 Misc. (N. Y.) 470, 84 N. Y. Supp. 1109 (1903).

[12] Matter of Baker, *supra;* Matter of Vanderbilt, 184 App. Div. 661, 172 N. Y. Supp. 511, aff'd 226 N. Y. 638, 123 N. E. 893 (1919).

[13] Under the doctrine of Matter of Orvis, *supra,* the transfer might be taxable in spite of this, if it were in fact donative. Whether it is or not does not concern us.

[14] Matter of Elting, 78 Misc. (N. Y.) 692, 140 N. Y. Supp. 238 (1912); Tyler *v.* Treasurer and Receiver General, 226 Mass. 306, 115 N. E. 300 (1917). The distinction that in the life insurance cases the payment is made by the insurer, and not out of the estate of the decedent, is not important. The beneficiary gets from the decedent's contract a right to the proceeds, and this right takes effect in enjoyment after the decedent's death.